ORIGINAL

STATE OF INDIANA

PUBLIC SERVICE COMMISSION OF INDIANA

IN THE MATTER OF AN INVESTIGATION TO DETERMINE THE EXTENT OF REGULATION OF RADIO COMMON CARRIERS BY THE COMMISSION PURSUANT TO PUBLIC LAW 92-1985, I.C. 8-1-2.6-1, ET. SEQ.

CAUSE NO. 37896

APPROVED: AUG 20 1986

BY THE COMMISSION:
Lynn M. Pylitt, Administrative Law Judge

This Cause was initiated by this Commission's "Order Instituting Investigation" issued on October 9, 1985. On December 27, 1985, a Prehearing Conference Order in this Cause was approved establishing a procedural framework for participation by interested parties in this investigation. Pursuant to the terms of that Prehearing Conference Order, reports by the Staff of this Commission regarding the subject matter of this investigation were filed with the Commission on February 7, 1986. On or about March 7, 1986, comments were filed by United Telespectrum of Indiana, Inc. ("United"), Ram Communications of Indiana, Inc. ("RAM"), Indiana Bell Telephone Company ("Indiana Bell") and by Mobilcomm of Indianapolis, Inc., Mobilcomm of South Bend, Inc. and Mobilcomm of Merrillville, Inc. (collectively "Mobilcomm"). On or about March 21, 1986, Reply Comments in this Cause were filed by the Commission's Accounting Staff, the Commission's Economics and Finance Staff, by Mobilcomm, by Indiana Bell, and by Ameritech Mobile Services, Inc. ("AMS").

Pursuant to notice duly given by the Commission an evidentiary hearing commenced in this Cause on April 8, 1986, at 10:00 a.m. in Room 907, State Office Building, Indianapolis, Indiana. Pursuant to the procedural framework established by the Prehearing Conference Order, the Staff Reports submitted in this Cause, which were also sponsored as Public's exhibits by the Utility Consumer Counselor, were admitted into the record and the preparers of those reports were subject to cross examination. Additionally, by agreement of all parties appearing and participating at the hearing, the Comments and Reply Comments submitted by the parties were admitted into the record.

On July 21, 1986, the Presiding Administrative Law Judge issued an entry suggesting that any party who so desired should file with the Commission a proposed order in this Cause on or before August 5, 1986. A "Joint Proposed Order" was filed by United, Mobilcomm, Indiana Bell, RAM and AMS.

On the basis of the record developed in this Cause, the Commission now finds as follows:

1. Notice and Jurisdiction. Notice of the public hearings held in this Cause was given and published by the Commission as required by law. Pursuant to I.C. 8-1-2.6-2 (a)(1), the Commission has jurisdiction to investigate and issue orders concerning the extent to which it will exercise jurisdiction over

telephone companies or telephone services operating or being provided within the State of Indiana. Accordingly, the Commission has jurisdiction over the subject matter of this Cause.

2. **Public Law 92-1985 and the Scope of the Investigation.** On April 18, 1985, Pub. L. 92-1985 (Senate Enrolled Act 530) was enacted adding a new chapter to the Indiana Code dealing with competition in the provision of telephone services. Generally, the new statute provides this Commission with flexibility in its regulation of telecommunication providers in a rapidly-changing environment. We have previously addressed the scope and nature of this new statute in our Order in Re Petition of Chicago SMSA Limited Partnership, PSCI Cause No. 37809, issued on October 2, 1985. We incorporate herein by reference the discussion of the new statute in that Order and find it equally applicable to the instant Cause.

In I.C. 8-1-2.6-1, the Indiana General Assembly declared that competition has become commonplace in the provision of certain telephone services and that traditional Commission regulatory policies and practices are not designed to deal with the competitive environment. Additionally, the Legislature stated that:

> An environment in which Indiana consumers will have available the widest array of state-of-the art telephone services at the most economic and reasonable cost possible will necessitate full and fair competition in the delivery of certain telephone services throughout the state;

In conformity with these policy declarations and in light of this Commission's early experience with proceedings brought under Pub. L. 92-1985, we have moved to identify the competitive telecommunication services which appear to be the most appropriate subjects of remedial action under the new law. By initiating this Cause, it was suggested that public utilities providing radio common carrier telecommunication services (RCCs) should be afforded relief under Pub. L. 92-1985. Although this Cause originally included cellular mobile services within its scope, we established a separate subdocket, PSCI Cause No. 37896-S1, to address the scope of regulation for those cellular providers which remain regulated by this Commission.

RCC services are basically of two types: paging and traditional mobile telephone services. These services are provided by companies which only provide RCC services and by other telephone companies, including landline telephone companies, which provide both RCC and other services. Through the use of radio frequencies of the electromagnetic spectrum, paging and traditional mobile service have grown into an important portion of the wide array of telecommunication services offered in the State of Indiana. The basic question addressed by this investigation is whether the nature of the RCC industry in the State of Indiana is such as to require continued exercise of this Commission's jurisdiction, in light of the standards established by Pub. L. 92-1985.

3. **Declining Jurisdiction.** In determining whether the "public interest" requires the Commission to decline to exercise its jurisdiction over RCC services or divisions of other telephone companies providing RCC services within the State of Indiana, either in whole or in

part, the legislature has set forth three (3) factors which we must evaluate. These factors will be separately considered below.

(a) Has technological change, competitive forces or regulation by other state and federal regulatory bodies rendered the exercise of jurisdiction by this Commission over RCCs unnecessary or wasteful?

All parties commenting in this Cause agree that the RCC market in Indiana is not a monopolistic environment and that competition exists. See Staff (Pilalis) pp. 10-12; Staff (Ibaugh) pp. 1-2; AMS pp. 2-3; United p. 2; Ram p. 2; Mobilcomm p. 7; Indiana Bell (Reply) p. 1. The vast majority of the comments filed in this proceeding have indicated that existing and proposed regulations by the Federal Communications Commission ("FCC") and other state regulatory commissions demonstrate a persuasive national regulatory policy promoting, and indeed requiring, an increasingly competitive RCC marketplace. See Staff (Pilalis) pp. 2-5; Staff (Pilalis Second Set) p. 3; Staff (Ibaugh) p. 2; AMS p. 3; United p. 4; Mobilcomm p. 5. Still other comments submitted in this Cause have stressed that new telecommunication technologies at work in the RCC industry enhance competition, go hand in hand with less restrictive regulatory policies and are promoted by abandonment of traditional regulatory restrictions. See Staff (Pilalis) p. 1; Staff (Pilalis Second Set) p. 2; AMS pp. 3-4.

A substantial amount of factual data was submitted in this Cause describing the competitive nature of the RCC market in Indiana. For example, the evidence indicates that there are 40 tariffs on file with the Engineering Department of this Commission by RCC companies. These authorized RCC companies, along with seven landline companies and 5 cellular mobile telephone companies, offer paging and/or mobile telephone services in virtually every county of the State. See Staff (Ibaugh) p. 1. Considering more limited geographic areas, there are at least 9 providers of paging and/or mobile telephone services operating in Indianapolis and its surrounding counties. See Staff (Ibaugh) p. 2. Two or more RCC firms serve 50 counties within the State of Indiana and the heaviest concentration of RCC firms exist in the counties of Boone, Hamilton, Johnson, Marion, Morgan and Shelby, each of which is served by 6 RCC firms. See Staff (Pilalis) p. 11. Additionally, the competitive nature of the RCC business in the State of Indiana is reflected in the prices the RCC firms charge, which appear to be set based upon marketplace dynamics rather than conventional "ratebase" and "rate of return" concepts. See Staff (Pilalis) p. 11.

Comments and evidence in the record also indicate that the existing degree of competition in the RCC marketplace is likely to be enhanced in the future due to the advent of new communication technologies and by the "implementation of less restrictive regulatory policies at the national level." See Staff (Pilalis) p. 11. In general, the vast majority of the comments submitted in this proceeding support the proposition that competitive forces have supplanted the need for Commission jurisdiction over the RCC industry. See AMS pp. 3-4; Mobilcomm pp. 7-8; RAM p. 2. As stated in the Staff Report of Labros Pilalis:

> The present mode of conventional public utility regulation that exists for the State's RCC industry, is incompatible with the industry's competitive character. The competitive environment that exists for the RCC firms cannot find the appropriate degree of

flexibility within the scheme of state public utility regulation that is accorded the traditional Landline telephone utilities.

Similarly, the Staff Report of Sandy Ibaugh stated that "RCCs are operating in a marketplace which is regulated by the forces of competition." In addition, the Commission notes that the Federal Communications Commission issued a report and order, after the public hearing was held in this Cause, which restricts the power of the Commission to deny a certificate of territorial authority to an RCC. Preemption of State Entry Regulations in the Public Land Mobile Service, 51 Fed. Reg. 15498 (April 24, 1986).

On the basis of all the comments submitted in this Cause, we find that substantial, persuasive and uncontroverted evidence of record supports the proposition that RCCs are operating, and will continue to operate, in a competitive environment. We find that traditional regulatory procedures and rate-making methods are incompatible with the competitive environment and that the exercise of Commission jurisdiction in this regard is unnecessary. We also find that the rapidly changing technology employed by the RCC industry renders the exercise of jurisdiction by this Commission unnecessary. We find that a persuasive federal regulatory scheme promoting competition in the RCC industry exists. With reference to the standards set forth at I.C. 8-1-2.6-2(b)(1), we find that technological change, competitive forces and pervasive regulatory policies of federal regulatory bodies render the exercise of jurisdiction by this Commission over the RCC industry unnecessary and wasteful.

(b) Does the exercise of this Commission's jurisdiction produce tangible benefits to RCC customers?

With minor exceptions discussed more fully hereinafter, all comments indicate that the exercise of most aspects of this Commission's jurisdiction over the RCC industry produces no tangible benefits for RCC customers. On the contrary, much of the evidence indicates that the exercise of unnecessary jurisdiction by this Commission will impose a wasteful regulatory burden upon the RCC industry, which may increase costs, inhibit further technological advancement and slow the expansion of RCC services and facilities within the State, all of which is contrary to the policies articulated by the Indiana General Assembly at I.C. 8-1-2.6-1.

Perhaps the most basic reason that jurisdiction by this Commission over RCCs produces no tangible benefits to RCC customers arises as a result of the competitive nature of the industry. As explained in the Staff Report of Mr. Pilalis:

> The primary reason that conventional public utility regulation completely fails to rapidly and adequately price the ever evolving services of the RCC firms is the absence of a "captive" customer base for the various RCC concerns. Unlike the customer base of a traditional landline telephone utility, the customers of the RCC firm have several choices regarding the provider and the kind of service they wish to receive, including the choice of completely foregoing the opportunity to have mobile communications capability. Consequently, the customer base of the RCC firm is extremely sensitive to the combinations of price changes and service offerings available in the marketplace. This sensitivity

translates directly to a high degree of required market responsiveness and flexibility on the part of the RCC firm. The RCC firm has to respond rapidly to changing market conditions regarding price, products, services, technology, etc., or face substantial loss of revenue due to erosion of its customer base.

The state public utility regulatory process is not geared to provide such a degree of flexibility through its "ratebase," "rate of return" and "market entry and exit" regulatory process. Instead, it may impose indirect and direct costs on the fully regulated RCC firm through lost business opportunities and lengthy adjudicatory proceedings. In turn, the state public utility regulatory process imposes considerable costs upon itself by devoting time and resources that could otherwise have been utilized for the resolution of numerous regulatory issues that relate to the more conventional public utilities.

Similar views were expressed in United's comments in the following words:

> Competition, not regulation, forces paging providers to offer quality services at reasonable rates. The public interest considerations which make necessary regulation of natural monopolies, do not apply to an industry which provides non-essential services in a competitive market.

Other comments also indicate that the RCC industry, because it is inherently competitive, is not an appropriate industry for economic regulation by this Commission and continued imposition of such regulation will result in "direct and indirect cost to the interested enterprise and to the Commission as well." Staff (Pilalis) p. 17. Such unnecessary costs may ultimately be borne by RCC consumers. Therefore, the continued imposition of jurisdiction by this Commission may only serve to impose additional, unnecessarily costs upon those customers. As stated by Staff witness Pilalis in his comments:

> The members of the public have been, are, and will be making their choices for mobile communication services vendors, without the need for the very limited protection that is currently offered by the present regulatory scheme.

On the basis of substantial, persuasive evidence of record, we find that the exercise of jurisdiction over the RCC industry by this Commission produces no tangible benefits to RCC customers within the meaning of IC 8-1-2.6-2(b)(2). On the contrary, the exercise of unnecessary jurisdiction by this Commission imposes a wasteful regulatory burden upon RCC providers which will increase costs, inhibit further technological advancement and slow the expansion of RCC services and facilities, all of which is contrary to the policies articulated hy the Indiana General Assembly at I.C. 8-1-2.6-1.

(c) Does the exercise of jurisdiction by this Commission over RCCs inhibit RCCs from competing with unregulated providers of functionally similar telephone services or equipment?

All evidence of record with reference to the standards set forth at I.C. 8-1-2.6-2(b)(3) supports a conclusion by this Commission that continued regulation of the RCC industry will inhibit regulated RCCs from competing with

unregulated providers of functionally similar telephone service and equipment. See Ram p. 3; Mobilcomm (Reply) p. 2. Specifically, some comments point out that regulated companies providing RCC services are in competition with unregulated radio and television broadcasters who may be providing mobile paging and two-way mobile communication services. Staff (Pilalis) p. 11. Additionally, they are increasingly in competition with cellular mobile communication providers. Staff (Pilalis) p. 12. In this regard we determined on April 19, 1984, in Cause No. 37274, that "resellers" of cellular mobile telephone service are not "telephone companies" within the meaning of the Public Service Commission Act and accordingly are not subject to this Commission's jurisdiction. Clearly, RCC telephone companies and divisions of other telephone companies providing RCC services are in competition with such unregulated "resellers." We also note that some facilities based cellular mobile telephone companies in the State have already received orders declining to exercise virtually all aspects of our jurisdiction over their service offerings and equipment, and these cellular providers also are in competition with RCC companies. See Chicago SMSA Limited Partnership, supra; Re Gary Cellular Telephone Company, PSCI Cause 37998, April 16, 1986.

Based upon substantial, persuasive and uncontroverted evidence of record we find that continued exercise of jurisdiction by this Commission over RCCs will inhibit RCCs from competing with unregulated providers of functionally similar telephone services or equipment.

We conclude from the above findings, and qualified only by subsequent Finding 4, that the Commission should decline to exercise its jurisdiction over RCC companies and services, and divisions of landline telephone companies that provide RCC services. Such declination will permit the provision of RCC services at promotional, experimental, volume, and other rate bases typical of competitively priced services. Uniform rates in accordance with printed schedules on file with the Commission, and other "traditional" regulatory economic requirements and processes should not be required with respect to RCC services.

4. **Exercising Jurisdiction In Part.** This Commission has jurisdiction to regulate RCC telephone companies and other telephone companies' RCC intrastate operations in many respects, including, but not limited to, regulation of: rates, charges, rules and regulations for service, both retail and wholesale; use of utility franchises and equipment by other utilities; utility accounting standards, record keeping and rates for depreciation; utility construction expenditures in excess of ten thousand dollars ($10,000.00); utility arrangements for distribution of surplus profits; utility filings of measurement of standards of service, classifications of service and tariffs; utility transactions with affiliated interests; utility issuances of stocks, certificates of stock, bonds, notes or other evidences of indebtedness; sales, transfers or leases of utility franchise works or systems; geographic limits on utility authorized service territories; and, filing of annual reports, filing reports concerning accidents and payment fees to the commission by utilities. In addition to this, the Commission also has the jurisdiction to require RCC telephone companies and divisions of other telephone companies promoting RCC services to conform to certain rules and regulations promulgated by this Commission. In general, all evidence of record in this Cause indicates that the Commission should decline to exercise virtually every aspect of its jurisdiction over such telephone companies pursuant to I.C. 8-1-

2.6-2. However, reports and comments in this Cause suggest that it might be appropriate for the Commission to continue to exercise four (4) aspects of its jurisdiction over the RCC industry, or a portion thereof. Each of these suggestions will be addressed separately hereinafter.

(a) Entry Restrictions and Jurisdiction Over CTAs. As previously stated, this Commission has jurisdiction over RCC telephone companies and other telephone companies providing RCC services with reference to the geographic limits on utility authorized service territories and the sale or transfer of such authority. We note, however, the continuing litigation concerning FCC pre-emption of state regulation in this, and other areas. Pursuant to I.C. 8-1-2-88 the Commission has traditionally exercised this jurisdiction by requiring telephone companies providing RCC services to hold a certificate of territorial authority (CTA) before commencing operation in the State and to seek approval of the Commission for the transfer, expansion or abandonment of a CTA. Two questions concerning this aspect of the Commission's jurisdiction have been presented by the comments in this Cause. The first question concerns whether this Commission should continue to exercise its jurisdiction to require a new entrant into the Indiana RCC marketplace to secure a CTA, and if so whether an alternative, expedited CTA procedure is appropriate in such circumstances. A second but related question concerns whether the Commission should exercise jurisdiction to require telephone companies who already possess a CTA from this Commission for RCC services to seek approval for transfer, expansion or abandonment of the CTA, and if so whether an expedited procedure should be available in such circumstances.

In previous cases arising under the new statute we have determined that the Commission should continue to exercise its jurisdiction over the issuance of new CTAs and exercise jurisdiction requiring approval for the expansion, transfer or abandonment of existing CTAs. We have also determined, however, that the exercise of our CTA jurisdiction should be limited to a simplified regulatory procedure in which the petitioning company should publish notice of any proposed CTA activity in the counties affected by that activity and provide any relevant information about the proposed CTA activity to the Commission and the Utility Consumer Counselor. Unless a hearing is requested in writing by the UCC or someone with a substantial interest in the CTA activity, or unless this Commission on its own motion indicates the need for a hearing, the Secretary of this Commission should issue documents granting the relief requested within sixty (60) days of the filing of the request for CTA relief. Chicago SMSA Limited Partnership, supra; Re Gary Cellular Telephone, supra; Re Litel Telecommunications Corporation, PSCI Cause No. 37718, July 23, 1986. See, Staff (Ibaugh) pp.4-5; Staff (Pilalis) p. 17.

Another party has commented and suggested that those entities who have not already received CTAs from the Commission, but who wish to enter the RCC marketplace, should be required to undergo a more thorough analysis by this Commission, or a less expedited procedure, than those RCCs who already possess authority from this Commission and merely wish to expand or transfer their existing authority. Mobilcomm pp. 6-7.

Yet a third group of comments suggest that any restrictions on market entry or expansion of CTAs represent a tangible threat to competition. They urge that the Commission carefully circumscribe the exercise of its jurisdiction to avoid the potential for CTA procedures to be utilized to

frustrate introduction of new competitors or the expansion of activities by existing competitors. United p. 3; AMS, pp. 6-10; Staff (Pilalis Second Set) pp. 1-2.

We appreciate the concern expressed in some of the comments that a less than adequately qualified new entrant in the RCC marketplace may present certain problems for the industry and the customers of such a new entrant. We also recognize the validity of those comments which suggest that unnecessary restraints on entry could be used as a tool by existing RCCs to frustrate the growth of competition. As noted in the comments "Current service providers should not be permitted to intervene and call a hearing simply to slow down their potential competitors and to increase the expense of that competitor."

The comments of AMS suggested that the beneficial effects of competition for the consuming public result not only from the existing level of competition between RCCs authorized to provide service in Indiana, but also result from the potential for new entrants to rapidly become active competitors in the marketplace. That comment points out:

> For example, competitive pressure to keep rates low exists not only because rates must be set low enough to compete with other operating RCCs; rates must also not be so high as to attract new competitors into the marketplace. Similar effects lead to the conclusion that the quality of service is enhanced not only by existing, but also by potential, competition. With regulatory barriers to market entry, inefficient RCCs may use even expedited regulatory procedures to protect themselves, not consumers, from the rigorous competition provided by new entrants. Both the existence of a direct competitor and the potential for new competitors to easily and rapidly enter the marketplace serve the public interest by placing natural economic restraints on RCCs, guaranteeing that competition will assure the availability of a high-quality service at low rates, as desired by consumers.

In reference to the need to protect the public and the RCC industry from "unqualified" new entrants, the following AMS comment strongly suggests that the remedy is competition, not regulation:

> AMS suggests that in the truly competitive marketplace, with no barriers to market entry, a new entrant which lacks sufficient financial, technical or managerial ability to provide RCC's services will be fully and swiftly regulated by the competitive marketplace. Because consumers will have a choice between competing RCCs, no tangible benefits can be produced for consumers by requiring a review of such factors prior to allowing the new entrant to offer service in Indiana. However, as the Commission is well aware, CTA proceedings wherein such factors are analyzed and disputed by the new entrant's competitors, are often extremely costly and time consuming. Ultimately, AMS believes that any restrictions on entry into the RCC marketplace in Indiana, other than those required to keep the Commission staff informed as to the geographical area in which an RCC will be providing services, are inappropriate and not supported by Ind. Code 8-1-2.6 et. seq.

Additionally, the Commission's Economics and Finance Staff pointed out that imposing more substantial informational requirements on RCCs that wish to

enter the market as compared to informational requirements for existing or "certified" RCCs presupposes that existing RCCs have the financial, technical and managerial ability to offer services in a new market and that a new entrant may not have such ability and thus must "prove" itself. The report noted that new entrants may have new services, products or technology to offer and reasoned that if a new entrant alone has to make such information the subject of a public hearing it may be dissuaded from entering the market. If this occurs, competition and the "public interest" stand to lose. It was also noted that additional information requirements for "new entrants" will impose an administrative burden on this Commission.

Based on all the evidence and comments submitted in this proceeding, we are convinced that the exercise of our jurisdiction over CTA activities, both for existing certificated RCCs and for new entrants, should be carefully circumscribed to avoid any adverse effects on competition. In this regard we find that, while we should retain jurisdiction over CTAs for new entrants, it should be carefully circumscribed to avoid any anti-competitive effects resulting from regulation. In this regard we find that while we retain jurisdiction pursuant to I.C. 8-1-2-88 over the issuance of new CTAs, the expansion of existing CTAs or the transfer of existing CTAs, that the exercise of CTA jurisdiction should be subject to a regulatory procedure whereupon a petitioner for a new CTA or for a change in an existing CTA, (i) publishes notice of the request in all counties affected by the proposal and (ii) provides the Commission and the Utility Consumer Counselor with a description of the proposed CTA activities. We also find that absent a written request by the Utility Consumer Counselor or another person with a substantial interest in the subject matter of a CTA request, or absent the Commission, on its own motion, indicating the need for a hearing, that a hearing concerning CTA requests should not be required. We find that any such requests or motions should be filed with the Commission within thirty (30) days from the date the CTA request was filed. If such a hearing is requested, the party requesting the hearing shall have the burden of proving that the entity seeking to receive a new or expanded CTA pursuant to the request is not fit. In the event a hearing is requested by a competitor of the entity to whom the CTA would be issued or transferred, the Commission may impose sanctions in the form of revocation of the competitor's CTA if the Commission finds that the request for a hearing and/or the prosecution of the request is frivolous or interposed merely for the purpose of delay. If no such hearing is requested, the Secretary of this Commission should issue documents to the Petitioner sufficient to establish that the relief requested by the Petitioner has been granted within a period not to exceed sixty (60) days from the date the CTA request was filed.

We find that the above-described regulatory procedure is consistent with a competitive environment within which the RCC industry operates, will minimize RCC costs without diminishing the quality of RCC service, will provide accurate data to the Commission concerning RCC services in a manner which is less costly for the telephone companies providing RCC services, their consumers and the Commission and that the alternative procedure will increase the efficient operation of RCC businesses to the benefit of RCC customers, all in conformity with the requirements of I.C. 8-1-2.6-3.

(b) Annual Reporting Requirement. The Commission's Accounting Staff witness, Michael Gallagher, recommended that the Commission continue to

exercise its jurisdiction over RCCs to impose the requirement that RCCs file an annual report to the Commission. The content of the annual report envisioned by Mr. Gallagher would include a significant amount of annual financial and business data concerning RCCs.

Comments of AMS and cross examination by AMS of witness Gallagher dispute the validity of continued imposition of an annual reporting requirement. AMS asserts that annual filings are unquestionably costly for RCC businesses, for their consumers and for the Commission itself and are contrary to the standards set forth at I.C. 8-12.6-3 (1); (2). As noted in AMS's comments:

> The Commission must confront the question of who, if any one, will benefit by requirement for RCCs to file financial and operating data with the Commission on a regular basis. To be sure, when such data is filed with the Commission, the data is available for inspection by all. Ind. Code 8 8-1-2-29(a). In a normal, unregulated competitive environment, much of the information which would be filed by RCCs with the Commission is sensitive, proprietary data. Commission must recognize that the filing of such information with the Commission may be a value only to an RCC's competitor . . .

A major justification provided by witness Gallagher for continued imposition of annual reporting requirements is that, given the transitional nature of the current RCC market, the possibility of a scenario involving the Commission having to re-exercise jurisdiction previously declined and the need to monitor the market, the Commission can be best informed if annual reports are still required. Additionally, through cross examination witness Gallagher indicated that such annual reports may be of value to consumers who wish to review those reports on file at the Commission. However, cross examination revealed that little, if any interest by consumers has ever been expressed for reviewing existing RCC reports. Witness Gallagher conceded that the preparation, receiving, checking, filing and maintenance of annual reports consumes RCC resources, staff resources and ultimately will be paid for by RCC consumers. The argument asserted by AMS in this regard is similar to the position taken by the Commission's Economics and Finance Staff with reference to the requirement of additional information from "new entrants". As staff member Pilalis stated:

> Additional information requirements for "new entrants" will also impose a considerable administrative burden on this Commission. Such a burden is not without cost to the state's taxpayers. The waste of valuable time for the staff of this Commission in inspecting, classifying, storing and even deciding if any "action" is merited upon the receipt of such documentations, affords little protection, if none at all, for the "public interest". Additional administrative burdens will be imposed on the staff of this Commission if members of the public request copies and explanations of such documents.

Furthermore, as one comment of AMS points out, the need for information by Staff can be satisfied without imposing a costly annual reporting requirement:

> AMS notes that, to the extent the Commission may find a situation where it needed information from one or more RCCs, the Commission may always, by statute, reassert jurisdiction to require the production of

such information, or, more likely, may find that the RCCs voluntarily provide the information, with or without the threat of reimposition of jurisdiction. [See generally, I.C. 8-1-2.6-2(c).]

In a recent case we have confronted the question of what filing requirements should be imposed upon competitive telephone companies. In the case of Re Litel Telecommunications Corporation, PSCI Cause No. 37718, July 23, 1986, we determined that the imposition of an annual reporting requirement on a competitive telephone company was unnecessary and wasteful within the meaning of I.C. 8-1-2.6-2(b)(1), particularly since the purported uses and benefits of such reports for the consuming public are, at best, speculative and remote. We also recognized the concern of competitive businesses that the continued exercise of jurisdiction by this Commission to require annual reports would unnecessarily reveal proprietary and confidential financial and business information.

Ultimately we concluded in that case that a less burdensome and less costly method for exercising jurisdiction over a competitive telephone company exists which will still satisfy the narrow area of concern expressed. We found that a competitive telephone company should provide the Commission with a list of names of its officers, agents or employees to be contacted by Commission staff to provide, on an informal basis, the information concerning accounting, engineering and customer inquiries. This method of securing information, only when needed and requested, would be a less-costly regulatory procedure for the telephone company, its consumers and the Commission within the meaning of I.C. 8-1-2.6-3(2). Additionally, since information which may not be needed by the Commission at all and which may also be proprietary and confidential information would not be on file with the Commission on an annual basis, this regulatory procedure was found to more consistent with a competitive environment within which the telephone company operated within the meaning of I.C. 8-1-2.6-3(5).

We are persuaded that this alternative regulatory procedure should also be applicable to the competitive companies providing RCC services within the State of Indiana. Accordingly, RCC telephone companies and divisions of other telephone companies providing RCC services should not be subject to annual reporting requirements, but should be required to file a list of persons in their organizations who are responsible for providing information, on an informal basis, to the Commission Staff, when requested.

(c) "Special" Restrictions on Landline RCC Activities. One party's comments suggested that the Commission continue to impose most aspects of its jurisdiction over RCC services that are provided by landline telephone companies. This suggestion is based upon allegations that landline telephone companies may, because of their size or their fully regulated monopolistic service offerings, engage in anticompetitive conduct, like cross subsidization between regulated services and RCC services. See Mobilcomm, p. 9. Other parties have challenged the suggestions of Mobilcomm. Extensive comments by some parties suggest that numerous remedies, short of continuing to impose jurisdiction over RCC activities by landline telephone companies, exist to prevent such anti-competitive conduct from developing. Ind. Bell, (Wooley), pp. 2-4. Ind. Bell (Responsive Comments); AMS pp. 15-18. Furthermore, some comments suggest that regulation of RCC services provided by landline telephone companies would only place these RCC service providers at a

competitive disadvantage with those telephone companies providing RCC services for whom the Commission has declined to exercise jurisdiction, contrary to the requirement of I.C. 8-1-2.6-2(b)(3). AMS, p. 15-16; Ind. Bell (Responsive Comments). Still other comments suggested that the adoption of Mobilcomm's proposals will "simply lead to the creation of stranded investment/excess capacity costs for the telephone utilities in question." If that should happen, the telephone utilities will have an incentive to avoid the regulatory process, and "load" the costs of abandoned or under utilized mobile communication assets on their other services to the detriment of the "public interest." Staff (Pilalis Second Set) pp. 2-3.

While we are not unmindful of the potential negative effects of anti-competitive conduct, like cross-subsidization by landline companies offering RCCs services, the record in this Cause is devoid of evidence, or even any allegations that such conduct is occurring or will actually occur at some future time. Indeed, the most that could be found is that, under certain circumstances, such conduct could occur. In this situation we choose to avoid the severe action of continuing regulation over only one segment of the RCC industry, merely as protection against a speculative possibility of abuse. Absent a showing of anti-competitive conduct or a showing that the RCC marketplace is not fully competitive, we are further persuaded in this regard because such unequal treatment could well run afoul of the legislative standards set forth at I.C. 8 8-1-2.6-2(b)(3), by handicapping, through continued regulation, one segment of the RCC industry.

This does not, of course, mean that anti-competitive conduct by any RCC, through cross-subsidization or any other method , will be countenanced by this Commission. Many remedies for such conduct are available. First, the Commission, an aggrieved competitor, a group of consumers or the UCC on behalf of the public may, upon a showing that such conduct may be attributable to any telephone company providing RCC services, invoke I.C. 8-1-2.6-2(c) to reimpose all or part of our jurisdiction over the offending telephone company. Furthermore, with specific reference to fully regulated services provided by a landline telephone company, in the process of rate making and prescribing accounting standards for those entities, the Commission can fashion a remedy for cross-subsidization or other anti-competitive conduct. Also, in the event anti-competitive conduct appears, existing remedies under the anti-trust laws can be invoked. As stated in the AMS comments:

> Both the existing anti-trust law and this Commission's continued exercise of jurisdiction over rates and charges for all monopoly services provided by local exchange telephone companies provides ample protection against any crosssubsidization or unfair competition.

Based on the above, we find that relief afforded under Pub. L. 92-1985 to all participants in the RCC industry should be uniform and that there is no need, at this time, to impose "special" restrictions upon RCC services provided by landline telephone companies.

(d) The Imposition of PSCI Fees. Pursuant to I.C. 8-1-6-1 "[P]ublic utilities subject to regulation and which enjoy the privilege of operating as public utilities in this state shall bear the expense of administering the provisions of IC 8-1-1 and IC 8-1-2." (Emphasis added.)

In the instant proceeding, Staff's Accounting Report and Staff Witness Gallagher suggests that the Commission should continue to exercise its jurisdiction to require the payment of PSCI fees by telephone companies or divisions of telephone companies providing RCC services within the State of Indiana, regardless of whether the Commission exercises other aspects of its jurisdiction over those telephone companies. In support of this position Mr. Gallagher has suggested three things:

(1) Since P.L. 92-1985 does not specifically state that the PSCI fee may be waived by the Commission, such action should not be taken;

(2) Commission Staff may continue to incur costs associated with consumer inquiries concerning RCC services, even after the Commission declines to exercise most aspects of its jurisdiction over RCC services and telephone companies or divisions of telephone companies providing such services; and

(3) If the Commission decides to reimpose jurisdiction over an RCC telephone company or division of a telephone company providing RCC services, the Commission would then incur costs associated with the regulation of the RCC services provided by that company. AMS, and other parties to this Cause, oppose continued imposition of the PSCI fee over RCC telephone companies or divisions of telephone companies providing RCC services.

With reference to Mr. Gallagher's allegation that the Commission may not be empowered to decline to impose a PSCI fee over such telephone companies or telephone company divisions, we note that the Commission is specifically "vested with the power" to direct the filing of reports concerning the annual fee and to devise and supply the form for such filings. See I.C. 8-1-6-5; -6. The Commission is given jurisdiction to receive payment of the fees and place such receipts in an account to be "utilized only for the purpose of funding the expense of the Public Service Commission and the consumer counselor . . . ." I.C. 8-1-6-2. The Joint Proposed Order includes the argument that I.C. 8-1-6-8 indicates that the Commission may enforce collection of PSCI fees and that absence of mandatory language indicating that the Commission shall enforce the collection of such fees gives the Commission discretion not to enforce the collection of such fees, even without recourse to the new law. See Sharton v. Slack (1982) , Ind. App. 433 N.E.2d 856; Cf. Re Investigation Into Gas Cost Tracking, PSCI Cause No. 37091, May 14, 1986, p. 21. We note that I.C. 8-1-6-8 provides that a public utility which fails to pay or under-pays a quarterly installment shall pay a penalty. The statute is then permissive as to whether the Commission enforces collection "...by legal action or in any other manner by which collection ...may be enforced by the laws of this state." We conclude, as a matter of law, that this Commission has jurisdiction to require the filing of reports concerning annual fees, to receive payment of annual fees and to seek enforcement of payment of annual fees.

Pub. L. 92-1985 explicitly provides that: "Notwithstanding any other statute, the Commission may . . . decline to exercise, in whole or in part, its jurisdiction over telephone companies or certain telephone services." I.C. 8-1-2.6-2. We find that the Commission specifically has the power to decline to exercise its jurisdiction. It is not clear whether "jurisdiction" includes the authority to require the filing of reports concerning annual

fees, receive payment of annual fees and to enforce the collection of annual fees. We do note that if we were to adopt witness Gallagher's position, we would be forced to conclude that the Commission could only decline to exercise aspects of its jurisdiction specifically mentioned in P.L. 92-1985. The Joint Proposed Order argued that since no specific aspects of the Commission's jurisdiction are explicitly mentioned in that statute, the interpretation urged by Witness Gallagher would render the law a nullity and that such in interpretation of the statute is clearly erroneous.

Under cross examination Mr. Gallagher conceded that the costs incurred by the Commission with reference to RCC services, particularly after declining to exercise all major aspects of our jurisdiction over RCCs, would be substantially less than the costs incurred by the Commission in the regulation of traditional public utilities which are subject to full rate base and rate of return regulation, periodic rate adjustments, proceedings for approval of financing and the filing and approval of numerous tariffs. Since the PSCI fee is based upon a fixed percentage of all utilities' intrastate gross revenue, the fee paid per dollar by RCC telephone companies or other telephone companies providing RCC services, even after the Commission declined to exercise most aspects of its jurisdiction over those companies would be the same, under witness Gallagher's recommendation, as the fee per dollar of gross revenue imposed upon utilities which consume a substantial amount of the Commission's resources. As a matter of law, pursuant to I.C. 8-1-2-42.5, as added by Pub. L. 88-1985, the Commission is required to review the rates and charges of the larger public utilities over which the Commission continues to exercise ratemaking jurisdiction no less often than every four (4) years. Even in the event of periodic review, the commitment of the Commission's resources may vary from utility to utility because some utilities will request rate changes more frequently than the mandated review period.

In support of his recommendation, Mr. Gallagher pointed out that the PSCI fee should be paid with respect to RCC services because the Commission may wish to reimpose jurisdiction in the future. Nontheless, should the Commission decide to reimpose jurisdiction over RCC services or the companies providing such services in the future the Commission could also, at that time, reimpose the PSCI fee to cover the costs incurred by the Commission in that future regulation.

In support of the continued imposition of the PSCI fee over RCCs Mr. Gallagher also noted that the Commission staff may incur costs if RCC consumers seek information concerning RCCs at the Commission. While we believe that the costs incurred by the Commission in this regard would certainly be de minimis and out of proportion to the PSCI fee imposed upon gross revenue, they remain "costs". Further, there will be some cost to the Commission even with the streamlined regulatory procedure set forth in Finding No. 4(a) above. Certainly if a hearing were requested under this procedure, these costs to the Commission would be more than de minimus.

This same issue of whether or not the imposition of the public utility fee should be discontinued for a company after the Commission has chosen to substantially decline to exercise its jurisdiction over said company was addressed in our recent Order in Cause No. 37718 issued on July 23, 1986 involving the petition of Litel Telecommunications Corporation. We noted in that Order that there are other considerations regarding the Commission's non-

imposition of PSCI fees. We pointed out that I.C. 8-1-6-1 provides that:

> ...The public utilities subject to regulation and which enjoy the privilege of operating as public utilities in this State shall bear the expense of administering the provisions of I.C. 8-1-1...I.C. 8-1-2...by means of a public utility fee on such privilege measured by the annual gross revenue of such public utilities in the manner provided by this Chapter.

We noted that Litel is a "public utility" within the meaning of that statute and that the Commission's determination to decline to exercise its jurisdiction, in part, does not change that public utility status. We believe this Finding is equally applicable to the RCCs. Our determination in this Order to decline to exercise our jurisdiction, in part, over the RCCs does not change their "public utility" status. If we determine that the Commission does have the authority to suspend the imposition of public utility fees under I.C. 8-1-2.6, we then must determine whether it is fair that the Commission provides some service to the RCCs yet requires the RCCs to pay nothing. If it is determined that the RCCs should pay some amount less than the full fee required by I.C. 8-1-6-1 then some determination must be made regarding the amount of the fee to be assessed.

In our Order in Cause No. 37718 we found that the issue raised regarding whether or not to impose P.S.C.I. fees, and what amount, upon utilities over which the Commission had declined to exercise its jurisdiction, in whole or in part, should be the subject of a future generic proceeding. Thus, we find that the request of the RCCs that PSCI fees not be imposed upon them should be taken under advisement pending the decision of this Commission in a future generic proceeding or further Order of this Commission. In the meantime, we find that public utility fees should continue to be assessed to companies providing RCC services.

IT IS THEREFORE ORDERED BY THE PUBLIC SERVICE COMMISSION OF INDIANA that:

1. The Commission shall decline to exercise its jurisdiction over RCC companies and RCC services provided by other telephone companies in all respects, except as specifically stated hereinafter. Accordingly, except as specifically set forth hereinafter, RCC companies and RCC services divisions of landline telephone companies shall be relieved of the obligations imposed by the Public Service Commission Act, and related statutes or regulations.

2. The Commission shall continue to exercise jurisdiction over RCC companies and services with reference to approval of the expansion of existing Certificates of Territorial Authority, the issuance of new Certificates of Territorial Authority, or the transfer of Certificates of Territorial Authority, pursuant to I.C. 8-1-2-88.

3. RCCs and other telephone companies providing RCC services may use the regulatory procedure set forth in Finding No. 4(a) hereinabove with reference to the Commission's exercise of jurisdiction over RCC services under I.C. 8-1-2-88.

4. The Commission shall continue to exercise its jurisdiction over RCC services and RCC companies or divisions at telephone companies providing RCC

services solely with reference to the filing with the Commission of a list of names, addresses and telephone numbers of officers, agents or employees designated by that company to be contacted by the Commission's Staff to provide, on an informal basis, information concerning accounting, engineering, and customer inquiries, as described more fully in Finding No. 4(b) hereinabove. Such companies and company divisions shall be required to keep the information on said list current.

5. The Commission shall institute a generic proceeding to determine whether or not this Commission should continue to impose P.S.C.I. fees and, if so, what amount, upon utilities over which the Commission has declined to exercise its jurisdiction in whole or in part.

6. Until further Order of this Commission, utilities providing RCC services shall, pursuant to I.C. 8-1-6-1, continue to pay the public utility fee.

7. This Order shall be effective on and after the date of its approval.

DUVALL, CORBAN, BAILEY, ZAGROVICH, AND O'LESSKER CONCUR:
APPROVED:
AUG 20 1986

I hereby certify that the above is a true and correct copy of the Order as approved.

Ted P Wilpoet
Secretary